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Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re Applications of)	MM DOCKET NO. 92-6
)	
NORMANDY BROADCASTING CORP.)	File No. BRH-910129UR
)	
For Renewal of License of)	
Station WYLR(FM) (95.9 MHz))	
Glens Falls, New York)	
)	
and)	
)	
LAWRENCE N. BRANDT)	File No. BPH-910430MB
)	
For a Construction Permit for)	
a New FM Station on 95.9 MHz)	
at Glens Falls, New York)	

To: The Commission

**REPLY TO COMMENTS ON MOTION TO
REOPEN RECORD AND ENLARGE ISSUES**

Lawrence Brandt ("Brandt"), by his attorney, hereby replies to the Mass Media Bureau's Comments on the Motion to Reopen the Record and Enlarge Issues that Brandt filed in this proceeding on April 16, 1997. As will be shown below, the Bureau's arguments against re-opening the record and adding the issues against Normandy Broadcasting Corporation ("Normandy") *at this time* are without merit and, thus, the Motion should be granted.

In its Comments, the Bureau correctly states that in order to justify re-opening the record, a movant must show that:

(i) It's motion is based upon new or newly discovered evidence not previously available to it;

(ii) the new evidence, if prove[d], would raise a substantial and material question of fact affecting the ultimate outcome of the proceeding;

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(iii) there is a substantial likelihood of proving the allegations if the case is remanded for a hearing.

The Bureau does not dispute that the information that Brandt has submitted in support of his Motion is newly discovered evidence not previously available. Moreover, the Bureau's statement that "Brandt's allegations and supporting evidence, unless adequately rebutted by Normandy, appear sufficient to warrant an investigation by the Bureau to determine whether rule violations have occurred" is an acknowledgment that Brandt has made out a *prima facie* case that Normandy has committed the violations alleged by Brandt.¹ Nevertheless, the Bureau does not support grant of the Motion at this time because, in its view, "it is by no means apparent that the new evidence, if prove[d], would raise substantial and material questions of fact" of decisional significance, or that there is a "substantial likelihood that the allegations would be prove[d]." The Bureau's position is flawed in several major respects.

First, the Bureau's position that "it is not apparent" that the new evidence, if proved, would raise substantial and material questions of decisional significance is predicated upon the Bureau's surprising assertion that unauthorized transfers of control "generally [are] not potentially disqualifying." This assertion is directly at odds with a long line of Commission

¹With its severely strained staff resources and backlog of cases warranting investigation, the Bureau would not consider an investigation unless it was satisfied that a *prima facie* case of serious violations had been established.

precedent cited in the Motion which establishes that abdication of control is, a most serious offense which always is "potentially disqualifying" and has often been the basis for denying or revoking a broadcast license.² See cases cited in Brandts' Motion.

Because unauthorized transfers of control are always potentially disqualifying, the new evidence presented by Brandt which establishes a *prima facie* case that Normandy has transferred control over WYLR and WWSC to a time broker clearly raises substantial and material issues of decisional significance which should be explored in a remand hearing. Moreover, the apparent abdication of control over WYLR and WWSC established by Brandt's Motion, if proved, would not be an isolated incident of serious misconduct by Normandy. Normandy has previously been found guilty of three separate misrepresentations which two different ALJ's have concluded were sufficient to disqualify Normandy as a licensee. If Normandy is found to have abdicated control over WYLR and WWSC, this serious misconduct would need to be evaluated in light of Normandy's previous misconduct, and the

²If the Bureau's position that unauthorized transfers of control are not potentially disqualifying is not clearly rejected by the Commission's ruling on Brandt's Motion, the long line of precedent which holds that such conduct is potentially disqualifying will be effectively overruled and licensees will be free to enter into arrangements with time brokers which "cross[] the line from . . . an excusable lack of adequate oversight to a *de facto* transfer of control," an offense that was referred to in *Fresno FM LP*, 6 FCC Rcd, 1570 (Rev. Bd 1991) as one "of the first magnitude," without fear of suffering any severe adverse consequences if they are caught.

pattern of repeated and continuing serious misconduct would leave the Commission with no choice but to disqualify Normandy.

Second, the Bureau has misconstrued the significance of the "main studio" and "public file" violations established by Brandt's Motion. Brandt does not claim that these violations, individually or together, constitute a grounds for disqualifying Normandy. But again, the violations cannot be viewed in isolation. The nature of the violations - the fact that Normandy has no management or staff presence at WYLR and WWSC, the fact that the issues programs lists for the stations do not reflect the broadcast of a single program responsive to community issues and needs over the course of the last six years, and the fact that the issues programs lists were obviously fabricated after Brandt's investigator requested to see them, are evidence of the extent to which Normandy has abdicated control over WYLR and WWSC and of Normandy's failure to operate the stations in the public interest. Moreover, the failure of Normandy to broadcast issue responsive programs and to maintain proper issues/programs lists is a further illustration of what the ALJ in this case referred to as Normandy's "arrogance of noncompliance." The arrogance is particularly glaring in view of the fact that the noncompliance has continued even after the seriousness of the noncompliance was made evident to Normandy by the Initial Decision in this case.

Third, the Bureau is mistaken in stating that Brandt's Motion essentially looks towards a revocation proceeding because the "issues sought do not relate to the period for which Normandy

is seeking renewal." For the purposes of determining whether the issues should be enlarged in this comparative renewal proceeding, it matters not when the actions that apparently constituted an unauthorized transfer of control occurred. Central to any renewal proceeding is the issue as to whether a renewal applicant is qualified to continue as a licensee. Disqualifying conduct engaged in by the renewal applicant after the end of the renewal term is equally, if not more, relevant than disqualifying conduct engaged in during the license term. The Bureau cites no authority for its suggestion that the disqualifying conduct that is the basis of Brandt's Motion cannot or should not be considered in the context of the present proceeding because it occurred after the renewal term, and Brandt's counsel is unaware of any such precedent.

Fourth, the Bureau's citation of Sections 8 and 10 of the Time Brokerage Agreement in question as evidence that Normandy has retained the requisite degree of control over WYLR and WWSC notwithstanding the evidence as to how the stations are actually being operated submitted by Brandt is at odds with Commission precedents and common sense. When considering whether a time brokerage arrangement amounts to an unauthorized transfer of control, it is necessary to look at how a station actually is being operated pursuant to the time brokerage agreement, not at provisions of the agreement or who holds legal title to the station's assets. *CanXus Broadcasting Corporation*, 10 FCC Rcd 9950 (1995); *FM Broadcasters of Douglas County*, 10 FCC Rcd 10429

(1995). In the latter case which is cited by the Bureau, the time brokerage agreement contained appropriate language regarding the right and obligation of the licensee to control the station in question, but an unauthorized transfer of control was found to have occurred because the evidence made it clear that the terms of the agreement had not been followed.

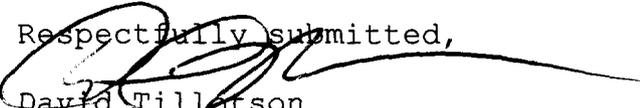
Finally, and most significantly, Normandy has not filed an opposition to the Motion³ and, thus, the allegations in the Motion stand un rebutted. In view of the fact that the Bureau itself has recognized that "Brandt's allegations and supporting evidence, unless adequately rebutted by Normandy, appear sufficient to warrant an investigation by the Bureau to determine whether rule violations have occurred," some sort of investigation in to the matters raised by Brandt's Motion is clearly in order. The only question that remains is whether that investigation should be conducted in the crucible of a further hearing in this case or through the Bureau's investigative proceedings. In view of the Bureau's limited resources for conducting investigations, the backlog of cases for the Bureau to investigate, the blunt tools available to the Bureau to conduct investigations and the fact that an unauthorized transfer of control of WYLR and WWSC, if it has occurred, should be

³The due date for an opposition pleading was April 30, 1997. To date, no opposition has been served on Brandt's undersigned counsel and Brandt's undersigned counsel has been advised by Bureau counsel that the Bureau has not been served with an opposition.

thoroughly investigated quickly, the answer is obvious. The apparent violations should be investigated through a further hearing. In a hearing, the burden of the investigation will fall to Brandt rather than the Bureau, thereby freeing the Bureau's limited resources for other investigations where the burden cannot be assumed by a private party. Moreover, the discovery tools available in a hearing will facilitate the development of a complete record of the facts and circumstances surrounding the apparent abdication of control by Normandy thereby enabling the Commission quickly to reach a reasoned decision as to whether an abdication of control occurred and, if it did, whether the abdication of control coupled with Normandy's other proved misconduct requires that Normandy be disqualified.

WHEREFORE, for the foregoing reasons, the record in this proceeding should be remanded and the case should be remanded for further hearings on the issues requested by Brandt.

Respectfully submitted,


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Dated: May 12, 1997

CERTIFICATE OF SERVICE

I, DAVID TILLOTSON hereby certify that a copy of the foregoing **REPLY TO MASS MEDIA BUREAU'S COMMENTS ON MOTION TO REOPEN RECORD AND ENLARGE ISSUES** has this 12th day of May 1997, been and has been sent by first class United States mail, postage prepaid, to:

Christopher P. Lynch, President
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Federal Communications Commission
Hearing Branch, Enforcement Division
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David Tillotson